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Amanah Raya Capital Sdn Bhd v Siti Zaharah bt Sulaiman

HIGH COURT (KUALA LUMPUR) — SUIT NO 22-NCC-25–01 OF 2013
NALLINI PATHMANATHAN J
7 MAY 2013

Evidence — Documentary evidence — Affidavit evidence — Whether provisions of Evidence Act 1950 apply to affidavit evidence — Exemption order exhibited in affidavit printed out from legal journal and not certified copy of government gazette — Whether admissible

Moneylenders — Accounts — Statement of — Production of — Principal amount and interest set out in annexure to writ — Whether statement of account properly produced — Moneylenders Act 1951 ss 19 & 21

Moneylenders — Moneylending agreement — Unsecured loan — Validity of — Whether use of form of agreement in Schedule J instead of Schedule K invalidated agreement — Whether use of wrong form rendered loan uncollectible — Whether lender exempted from complying with provisions of the Moneylenders Act 1951 — Whether Exemption overrode provisions of the Act — Moneylenders (Control and Licensing) Regulations 2003

Moneylenders — Unsecured loan — Borrower defaulting on repayment of loan — Non-disbursement of arrangement fee and upfront interest payment — Whether amount claimed conflicted with statement of account — Whether dependent failed to produce statement of account showing amount of principal and rate of interest — Whether borrower estopped from disputing loan

By way of two moneylending agreements (unsecured loan) ('the agreements'), the plaintiff had granted credit facilities to the defendant. The form of the agreements were in accordance with Schedule J of the Moneylenders (Control and Licensing) Regulations 2003 ('the Regulations') under the Moneylenders Act 1951 ('the Act'). The plaintiff in disbursing the facilities had retained a sum representing the arrangement fee and upfront interest payment. The defendant defaulted in repaying both the facilities. The defendant, through a letter, sought postponement of the payment of the monies due. The plaintiff claimed that this letter amounted to a clear admission of the defendant's liability. The plaintiff sought summary judgment for the recovery of the monies due to it under the agreements. The plaintiff contended that it was exempt from complying with the strict provisions of the Act by reason of an exemption

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obtained by it ('the exemption'). The defendant raised the following issues which it claimed were triable (i) whether the agreements were void and unenforceable as they were drafted in accordance with Schedule J rather than Schedule K of the Regulations. Both facilities were granted with security and therefore the correct form to be utilised for both agreements should be Schedule K rather than Schedule J; (ii) that the exemption had no legal effect because the exhibit produced in the affidavit was not a certified copy of a Government *Gazette* but a print out from a legal journal. The relevant *gazette* was not produced; (iii) the actual amount loaned was disputed since there was non-disbursement of the arrangement fee of RM30,000 and the upfront interest payment of RM60,000. This, the defendant claimed conflicted with the plaintiff's statement of account which showed a disbursement of RM1m without any deductions; (iv) that there had been failure to comply with s 21(1) of the Act because a moneylender is bound to produce a statement of account showing the amount of principal and the rate of interest; (v) that the plaintiff was estopped from relying on the exemption by virtue of cl 4 in the agreements whereby the lender undertook to conform to the provisions and requirements of the Act; (vi) if the agreements were void and unenforceable, was the plaintiff entitled to recover the monies loaned under s 66 of the Contracts Act 1950 ('Act'); and (vii) whether the plaintiff had charged interest in excess of the statutory rate.

Held, allowing the application with costs:

(1) The plaintiff had adopted the format set out in Schedule J in keeping with the Regulations and the Act. The plaintiff's error was in utilising the wrong form, ie the unsecured loan form rather than the secured loan form. Specific forms have been set out, the use of which is mandatory. As the plaintiff had in fact complied in spirit and principle with the Act and Regulations by utilising one of the forms prescribed, the use of the wrong form did not render the loan uncollectible. The plaintiff would not be deprived of recovering monies it loaned to the defendant simply because it utilised the wrong form, albeit one prescribed under the Act (see paras 18–19).

(2) It was entirely in order for the plaintiff to rely on a version of the exemption to provide evidence of its subsistence as the relevant PU number was clearly shown. The plaintiff had provided a proper copy of the exemption which the court could take into consideration. It was of legal effect (see para 24).

(3) It is trite that in matters involving affidavit evidence such as the present, the provisions of the Evidence Act 1950 have no application (see para 25).

(4) The plaintiff was exempt from complying with the provisions of the Act on the terms and conditions set out in the exemption. As such, the fact

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that the second agreement was not in accordance with Form K but was in the form prescribed by Form J did not render it void and unenforceable by reason of the exemption (see para 26).

(5) The exemption overrode the provisions of the agreements as it is subsidiary legislation which carries the force of law. Therefore estoppel did not come into play. Clause 4 in itself was insufficient to give rise to such an estoppel (see para 37).

(6) Under the Act and the exemption, the plaintiff may not levy more than 12% interest in respect of secured loans. Interest was levied at 8% as contracted. Therefore this did not comprise a 'triable' issue (see paras 44–45).

(7) The plaintiff had made out a bona fide claim for a return of monies loaned. The defendant through her letter had admitted that the monies claimed were in fact due and owing (see para 46).

(8) Even if the agreements were void and unenforceable by reason of the use of the wrong Form J instead of Form K, or for non-compliance with ss 19 and 21 of the Act, s 66 of the Act was applicable to allow the plaintiff to obtain restitution (see para 41).

[Bahasa Malaysia summary

Melalui dua perjanjian pinjaman wang (pinjaman tidak bercagar) ('perjanjian-perjanjian'), plaintif telah memberikan kemudahan kredit kepada defendan. Borang perjanjian-perjanjian tersebut adalah selaras dengan Jadual J Peraturan-Peraturan Pemberi Pinjam Wang (Kawalan Dan Pelesenan) 2003 ('Peraturan-peraturan') di bawah Akta Pemberi Pinjam Wang 1951 ('Akta'). Plaintif, dalam membayar kemudahan tersebut telah mengekalkan sejumlah wang sebagai mewakili bayaran fi pengurusan dan bayaran faedah. Defendan ingkar dalam membayar semula kedua-dua kemudahan. Defendan, melalui surat, memohon tangguhan bagi bayaran wang yang tertunggak. Plaintif menghujahkan bahawa surat ini terjumlah kepada pengakuan jelas liabiliti defendan. Plaintif memohon penghakiman ringkas bagi mendapatkan semula kesemua wang yang tertunggak padanya di bawah perjanjian-perjanjian. Plaintif menghujahkan bahawa ia terkecuali daripada mematuhi peruntukan-peruntukan ketat Akta atas alasan pengecualian yang diperolehinya ('pengecualian tersebut'). Defendan membangkitkan isu-isu berikut yang mana didakwa boleh dibicarakan: (i) sama ada perjanjian-perjanjian terbatal dan tidak boleh dikuatkuasakan kerana kesemuanya dirangka selaras dengan Jadual J dan bukan Jadual K Peraturan-peraturan. Kedua-dua kemudahan diberikan dengan cagaran dan oleh itu, borang sebenar yang harus digunakan untuk kedua-dua perjanjian adalah Jadual K dan bukan Jadual J; (ii) bahawa pengecualian tidak mempunyai kesan perundangan kerana ekshibit yang dikemukakan dalam afidavit bukanlah salinan *Warta* Kerajaan yang disahkan tetapi satu cetakan

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jurnal undang-undang. *Warta* yang relevan tidak dikemukakan; (iii) jumlah sebenar yang dipinjam dipertikaikan kerana tiada pembayaran bagi fi pengurusan sebanyak RM30,000 dan bayaran faedah pendahulusan sebanyak RM60,000. Dengan ini, defendan mendakwa, bertentangan dengan penyata akaun plaintif yang menunjukkan pembayaran RM1 juta tanpa apa-apa penolakan; (iv) bahawa terdapat kegagalan untuk mematuhi s 21(1) Akta kerana seorang peminjam wang terikat untuk mengemukakan penyata akaun yang menunjukkan amaun pokok dan kadar faedah; (v) bahawa plaintif diestop daripada bersandarkan kepada pengecualian berikutan klausa 4 perjanjian-perjanjian yang mana peminjam mengaku janji untuk mematuhi peruntukan-peruntukan dan syarat-syarat Akta; (vi) sekiranya perjanjian-perjanjian batal dan tidak boleh dikuatkuasakan, sama ada plaintif berhak mendapatkan semula wang yang dipinjamkan di bawah s 66 Akta Kontrak 1950 ('Akta'); dan (vii) sama ada plaintif telah mengenakan caj faedah melebihi kadar statutori.

Diputuskan, membenarkan permohonan dengan kos:

(1) Plaintif telah mengguna pakai format yang dinyatakan dalam Jadual J dalam mematuhi Peraturan-peraturan dan Akta. Kesilapan plaintif adalah menggunakan borang yang salah, iaitu borang pinjaman tidak bercagar dan bukan borang pinjaman bercagar. Borang-borang spesifik telah dinyatakan, yang mana penggunaannya adalah mandatori. Oleh kerana plaintif telah mematuhi maksud dan prinsip Akta dan Peraturan-peraturan dengan menggunakan salah satu borang yang dinyatakan, yang mana penggunaan borang yang salah akan menyebabkan pinjaman tidak boleh diambil. Plaintif akan terhalang daripada mendapatkan semua wang yang dipinjamkannya kepada defendan hanya kerana ia menggunakan borang yang salah, walaupun diperuntukkan di dalam Akta (lihat perenggan 18–19).

(2) Adalah wajar untuk plaintif bersandarkan kepada versi pengecualian untuk memperuntukkan keterangan mengenai sara hidup kerana No PU yang relevan jelas ditunjukkan. Plaintif mempunyai salinan pengecualian yang betul yang boleh diambil kira oleh mahkamah. Ia mempunyai kesan undang-undang (lihat perenggan 24).

(3) Adalah matan bahawa hal-hal perkara berkenaan keterangan afidavit seperti ini, peruntukan Akta Keterangan 1950 tidak terpakai (lihat perenggan 25).

(4) Plaintif dikecualikan daripada mematuhi peruntukan-peruntukan Akta atas terma-terma dan syarat-syarat yang dinyatakan dalam pengecualian. Dengan itu, fakta bahawa perjanjian kedua tidak selaras dengan Borang K tetapi dalam borang yang dinyatakan di dalam Borang J tidak menjadikannya batal dan tidak boleh dikuatkuasakan dengan sebab pengecualian (lihat perenggan 26).

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(5) Pengecualian mengatasi peruntukan-peruntukan perjanjian-perjanjian kerana ia adalah perundangan subsidiari yang membawa kesan undang-undang. Oleh itu, estopel tidak memainkan peranan. Klausa 4 dengan sendirinya tidak cukup untuk membangkitkan estopel sedemikian (lihat perenggan 37).

(6) Di bawah Akta dan pengecualian, plaintif tidak boleh levi lebih daripada faedah 12% bagi pinjaman yang dicagarkan. Faedah dilevikan pada 8% seperti yang dikontrakkan. Oleh itu, ini bukanlah isu yang 'boleh dibicarakan' (lihat perenggan 44–45).

(7) Plaintif telah membuat tuntutan bona fide bagi pemulangan wang yang dipinjamkan. Defendan menerusi suratnya telah mengakui bahawa wang yang dituntut sememangnya tertunggak dan terhutang (lihat perenggan 46).

(8) Jikapun perjanjian-perjanjian tersebut batal dan tidak boleh dikuatkuasakan kerana penggunaan Borang J dan bukan Borang K, atau kerana ketidakpatuhan ss 19 dan 21 Akta, s 66 Akta adalah terpakai untuk membenarkan plaintif mendapatkan pemulangan (lihat perenggan 41).]

Notes

For cases on statement of accounts, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 460–468.

Cases referred to

Aseam Credit Sdn Bhd v Eminent Avenue Sdn Bhd [2008] 1 MLJ 441; [2008] 1 CLJ 12, CA (distd)

Boustead Trading (1985) Sdn Bhd v Arab Malaysian-Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (not folld)

MBF Cards Services Sdn Bhd v Chew Ah Too @ Chew Hoe Kee [2009] 1 MLJ 684, CA (refd)

Yeep Mooi v Chu Chin Chua & Ors [1981] 1 MLJ 14; [1960] 1 LNS 169, FC (refd)

Legislation referred to

Contracts Act 1950 s 66

Evidence Act 1950 ss 76, 77, 115

Moneylenders Act 1951 ss 2A(2), 10, 10P, 10P(1), (2), (3), 19, 21, 21(1)

Moneylenders (Control and Licensing) Regulations 2003 reg 10(1), Schedules J, K

Sean Ong (Christina Ang with him) (Lee Ong & Kandiah) for the plaintiff.
M Moghan (Moghan & Co) for the defendant.

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Nallini Pathmanathan J:

[1] The plaintiff's claim against the defendant is for a return of monies loaned to her by the defendant together with late payment charges on the said sum. The plaintiff is a licensed money lending company incorporated in Malaysia.

BRIEF FACTS

[2] The outline facts are comprehensively set out in the written submissions of learned counsel for the plaintiff and I adopt and reproduce in large part of those submissions in relation to the salient facts.

[3] At the defendant's request in or around December 2008, the plaintiff approved a credit facility in favour of the defendant in the sum of RM75,000 ('the first credit facility'). The plaintiff and the defendant then entered into a moneylending agreement ('unsecured loan') dated 23 December 2008 ('the first moneylending agreement'). The form of the agreement was in accordance with Schedule J of the Moneylenders (Control and Licensing) Regulations 2003 ('the Regulations') under the Moneylenders Act 1951. A copy of the said moneylending agreement was sent to the defendant, according to the plaintiff, on 23 December 2008 and the said sum was duly disbursed to her on the same date. This is not in issue. Pursuant to the terms of the first moneylending agreement the defendant was to repay the plaintiff a total sum of RM81,000 in one payment by 22 December 2009. The plaintiff complains that it failed to receive any payment from the defendant by the aforesaid due date of 22 December 2009 or thereafter. Accordingly a legal demand dated 20 April 2011 was issued to the defendant , which demand included 8% late payment interest per annum computed on a daily basis. This is in accordance with cl 2 of the first moneylending agreement.

[4] The plaintiff also afforded a second or further credit facility to the defendant in the sum of RM1,000,000 (RM1m) pursuant to a further request by the defendant in 2009. Vide letter of offer dated 18 March 2009, the plaintiff issued a letter of offer to the defendant stating that it had approved in principle a loan of RM1m to her on specific terms. These terms included, inter alia, the following:

(a) a facility amount of RM1m;

(b) an interest rate of 8%pa calculated on a flat rate basis (as explained in the agreement);

(c) a term of 24 months;

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(d) disbursement was to be made to the defendant after deductions of RM30,000 by way of an arrangement fee, up to RM14,000 for stamp duty and legal costs, upfront interest payment of RM60,000. The balance was to be disbursed to the defendant at an account nominated by her;

(e) the facility was repayable on demand. Additionally the defendant was to repay the entire facility upon the expiry of the term of 24 months;

(f) upon expiry of the term or until a demand for repayment is made the instalment repayments of the facility were in eight instalments. The first to seventh instalment comprised RM20,000 each totalling RM140,000, while the eighth instalment payment upon expiry of the term comprised a sum of RM1,020,000. As such the total sum repayable by the defendant to the plaintiff is RM1,160,000;

(g) as security for this facility the plaintiff procured a private caveat and first party fixed charge over land in Pahang; and

(h) there were several other terms and conditions set out in the letter of offer.

[5] The defendant agreed to the terms and conditions in the letter of offer as borne out by her execution of the memorandum of acceptance.

[6] Thereafter the plaintiff and the defendant entered into a moneylending agreement (unsecured loan) dated 24 March 2009 ('the second moneylending agreement') in accordance with Schedule J of the Regulations. In like manner to the first moneylending agreement, the second moneylending agreement was sent to the defendant on 24 March 2009 and the principal sum duly disbursed on 25 March 2009.

[7] Apart from the retained upfront interest payment that had been retained by the plaintiff prior to disbursement of the monies under the second moneylending agreement, and in breach of the express provisions of the same for a repayment of quarterly instalments, the defendant failed to make any other payments towards settling this facility.

[8] Upon maturity of this second credit facility in March 2011, the plaintiff's solicitors on 1 April 2011 issued a letter of demand for a sum of RM1,106,381.34 being the instalments from the fourth to eighth quarters together with 8% late payment interest per annum on a daily basis. The defendant however, failed, neglected or refused to settle the said sum.

[9] On or about 17 October 2012, vide letter dated 4 October 2012 the defendant wrote to the plaintiff seeking a postponement of the payment of the monies due under the second facility for a period of two months. After setting

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out her reasons for the request, the defendant handwrote a note stipulating: 'Sebagai tanda komitment saya berusaha membayar lima belas ribu ringgit sementara menunggu perincian proposal ...' To this end the defendant made a payment of RM15,000. The plaintiff utilised the said sum by way of part payment for the second credit facility.

[10] The said letter amounts to a clear admission of the defendant's liability to the plaintiff under the second moneylending agreement. As such vide this application for summary judgment the plaintiff seeks a recovery of the monies due to it under the first and second moneylending agreements.

[11] In response to the plaintiff's claim the defendant raises the following issues which it is claimed, are triable.

Issue (1): Whether the first and second moneylending agreements are void and unenforceable as they were not entered into in accordance with the prescribed form provided under the Regulations and thereby the Act

[12] The defendant contends that the first and second moneylending agreements are void and unenforceable because they are drafted in accordance with Schedule J, rather than Schedule K of the Moneylenders (Control and Licensing) Regulations 2003, more particularly reg 10(1). It is not in issue that both facilities were in fact granted with security and therefore the correct form to be utilised for both agreements should be Schedule K rather than Schedule J. In this regard reg 10(1) of the Moneylenders (Control and Licensing) Regulations 2003 is relevant:

> Every agreement for moneylending transaction without security shall be in the form prescribed in Schedule J and where the agreement for moneylending transaction with security shall be in the form prescribed in Schedule K and any moneylender who executes moneylending agreement other than any of the Schedules commits an offence under the Act and shall on conviction be liable to a fine and imprisonment specified under subsection 10P(2) of the Act.

[13] The defendant also points to s 10P(3) of Part V of the Moneylenders Act which provides:

> (3) Any moneylending agreement which does not comply with the prescribed form shall be void and have no effect and shall not be enforceable.

[14] The defendant essentially contends that as the agreements were entered into in Form J which deals with unsecured loans, rather than Form K which deals with secured loans, the two loans should be regarded as void and unenforceable.

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[15] It is apparent from the foregoing that reg 10(1) and s 10P(3) fall for consideration and construction. Is the effect of the two provisions such that in the event the plaintiff inadvertently utilises the wrong form for the grant of a moneylending transaction, the entire transaction becomes void and unenforceable?

[16] The other relevant parts of s 10P provide as follows:

> (a) A licensee who intends to lend money to a borrower shall enter into a moneylending agreement with the borrower and that agreement shall be in the prescribed form.
>
> (b) Any licensee who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit or ot imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment ...

[17] A reading of reg 10(1) and s 10P in its entirety appears to this court, to seek to ensure that all moneylending transactions are in the forms prescribed under the Act or Regulations. It seeks to punish those persons who function as moneylenders and enter into agreements *otherwise than as prescribed by the Act and the Regulations*. (Emphasis added.) In other words if a moneylender has executed a moneylending agreement which is not in either the prescribed Forms J or K or as otherwise provided under the Regulations and seeks to bind the borrower to terms and conditions which are inconsistent with or different from that set out in Schedule J or K then such a moneylending agreement would be void and unenforceable.

[18] In the instant case here however it is evident that the plaintiff has infact adopted the format set out in Schedule J in keeping with the Regulations and the Act. The plaintiff's error was in utilising the wrong form, ie the unsecured loan form rather than the secured loan form. The next issue that falls for consideration is whether on a reading of reg 10(1) and s 10P(1)–(3) the loan disbursed to the defendant under Schedule J is therefore deemed void and unenforceable. This does not appear to be the correct construction to be accorded to these provisions. As stated earlier the mischief that the Act and Regulations promulgated under seek to contain or prevent, is the forcing upon borrowers of onerous and punishing terms and conditions in relation to moneylending transactions. To this end specific forms have been set out, the use of which is mandatory. As the plaintiff here has in fact complied in spirit and principle with the Act and Regulations by utilising one of the forms prescribed it does not appear to this court that the use of the wrong form renders the loan uncollectible. That might well have been the case if the

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plaintiff had utilised neither Forms J or K or any other form prescribed by the Act. But that is not the case here.

[19] As such it appears to this court upon a reading of these provisions that the correct construction to be accorded to these provisions is to render void and unenforceable any moneylending agreement which fails to comply with any of the forms prescribed by the Act or Regulations. To determine otherwise, to my mind would lead to an absurdity. The net result would be that the plaintiff would be deprived of recovering monies it loaned to the defendant simply because it utilised the wrong form, albeit one prescribed under the Act. This appears to be an untenable construction to adopt.

[20] In *MBF Cards Services Sdn Bhd v Chew Ah Too @ Chew Hoe Kee* [2009] 1 MLJ 684, the Court of Appeal laid down the principle to be applied when construing a particular clause in a statute:

> ... The test thus is to see whether the interpretation is a sound one or not. If it leads to some injustice and/or absurdit, then a need arises to gauge the real and true intention of the Legislature (*Interpretation of Statute* by Bindra at p 235). Obviously a harmonious construction should be given in order to avoid making one provision of the Act conflict with the other ...

[21] Accordingly I concur with learned counsel for the plaintiff that in order to read or construe reg 10(1) and s 10P(1)–(3) harmoniously these provisions should be read to mean that it is mandatory that any moneylending transaction entered into under the Act should conform in principle with the format prescribed thereunder. As that has in fact been done in the instant case, simply the wrong form that was utilised it follows that the loan is not rendered unenforceable.

[22] Alternatively the plaintiff contends that it is exempt from complying with the strict provisions of the Act by reason of an exemption obtained by it with effect from 26 January 2009. The plaintiff points out that an 'Exemption under Subsection 2A(2) PU(B) 35/2009' was procured by it with effect from 26 January 2009 for a term of five years. The defendant however maintains that this exemption produced by the plaintiff and duly *gazetted* has no legal effect. These matters comprise the second 'triable' issue, according to the defendant.

Issue (2): Is the exemption procured by the plaintiff effective or otherwise

[23] The defendant contends that the exemption produced by the plaintiff both in its affidavit and in the bundle of authorities, namely PU(B)235/2009 has no legal effect because the exhibit produced in the affidavit is not a certified copy of a Government *Gazette* but a print out from a legal journal. The relevant *gazette* was not produced. In this context the defendant relies on the case of

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Aseam Credit Sdn Bhd v Eminent Avenue Sdn Bhd [2008] 1 MLJ 441; [2008] 1 CLJ 12 where the creditor, also a moneylender, produced only a letter from the Ministry of Housing and Local Government advising of the existence of an exemption, rather than the exemption itself. In these circumstances the Court of Appeal held that the letter was insufficient to show proof of exemption. The relevant *gazette* had to be made available. It was held that the non-production of the *gazette* and the attempt to rely solely on the letter was not a mere irregularity and could not amount to proof of exemption.

[24] It is clear from the foregoing that the said case is entirely distinguishable from the present where it is not issue that such a *gazette* does indeed exist as shown by the plaintiff in its exh MSJ8. It is entirely in order for the plaintiff to rely on a version as published by the *Current Law Journal* to provide evidence of its subsistence as the relevant PU number is clearly shown. It is in subsidiary legislation in respect of which the plaintiff has provided a copy. The exemption clearly refers solely to the plaintiff and provides exemption for a period of five years with effect from 26 January 2009. In these circumstances I am satisfied that the plaintiff has provided a proper copy of the exemption which the court can take into consideration. In other words it is of legal effect. The lack of production of the original *gazette* does not detract from the validity of PU(B)35/2009.

[25] The defendant further submitted that the plaintiff was bound to provide a certified true copy of the exemption in accordance with ss 76 and 77 of the Evidence Act 1950. It is trite that in matters involving affidavit evidence such as the present, the provisions of the Evidence Act have no application.

[26] I am therefore satisfied that Issue (2) does not comprise a 'triable' issue. The plaintiff was therefore exempt from complying with the provisions of the Moneylender's Act on the terms and conditions set out in PU(B) 35/2009. As such the fact that the second moneylending agreement was not in accordance with Form K but was in the form prescribed by Form J does not render it void and unenforceable by reason of the exemption.

[27] With respect to the first moneylending agreement, as it was entered into prior to the exemption January 2009, it follows that the exemption does not apply. However the issues raised in (i) are applicable and I have concluded there that the use of the wrong form does not render the loan unenforceable.

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Issue (3): Dispute on the actual amount loaned and therefore owed by the defendant to the plaintiff

[28] In essence the defendant queries the non-disbursement or retention of:

(a) the arrangement fee of RM30,000; and

(b) the upfront interest payment of RM60,000.

[29] This the defendant maintains conflicts with the plaintiff's statement of account which shows a disbursement of RM1m without any deductions. This it is contended gives rise to a serious issue to be tried in relation to the actual amount due and owing.

[30] In response to this the plaintiff points to the letter of offer issued to the defendant dated 18 March 2009 where it is expressly provided that an arrangement fee in the sum of RM30,000 as well as an upfront interest payment of RM60,000 comprising instalments 1–3 of the repayment sums, would be retained or deducted at the outset. The defendant accepted these express terms as set out in the memorandum of acceptance executed by her.

[31] The defendant moreover never challenged or took umbrage at these deductions throughout the tenure of the second facility until the commencement of legal proceedings. Upon a consideration of the moneylending documents in their entirety it is evident that the plaintiff at all material times advised the defendant fully of all deductions or retentions to be made in respect of the second moneylending agreement. It is therefore not tenable for the defendant at this juncture, when the monies are due and owing by her, to seek to suggest that the terms are less than clear. This is a fit case for the application of the doctrine of estoppel. The defendant saw fit to accept the terms as set out in the letter of offer and which make clear all deductions and retentions, then went on to accept the RM1m less the deduction and retention sums for a period of two years without questioning the same. The plaintiff acted to its detriment in disbursing the sums it had agreed to do so, expecting to be repaid under the terms of the agreement, after two years and in a specified sum which included interest. Given the defendant's conduct in accepting the terms and the monies disbursed without contest or complaint, she is estopped from now contending that the amount repayable by her is in dispute.

[32] Further given the existence of the exemption under PU(B) 35/2009, the deductions or retentions by the plaintiff do not amount to a contravention of the Act. It appears to this court that this too does not comprise a 'triable' issue.

Issue (4): Has there been a failure to comply with s 21(1) of the Moneylender's Act 1951

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[33] The defendant refers to ss 21 and 10 and contends that a moneylender such as the plaintiff is bound to produce a statement of account as prescribed in s 19. Section 19 in turn requires the statement of account to show the amount of principal and the rate of interest. The defendant complains that in para 8 of the statement of claim the plaintiff did not specify the actual amount actually released to the borrower after the deduction of the arrangement fee and the upfront interest payment.

[34] The plaintiff maintains that it has complied with the provisions of s 19 of the Act notwithstanding the exemption. The plaintiff points to the annexure to the writ in this action which sets out in tabular form in full the principal amount as well as the interest levied in respect of the loan under the second moneylending agreement. It is apparent from a perusal of the same that the table or statement of account has been produced in compliance with the provisions of s 19 and therefore s 21 (s 21 envisages that where proceedings are taken in any court by a licensee for the recovery of any monies lent, the moneylender is to produce a statement of account as prescribed in s 19).

[35] Further and in any event, in view of the exemption, it is not fatal if the plaintiff does not issue a statement in accordance with s 19. However despite this, the plaintiff has done so. Therefore this too cannot comprise a 'triable' issue.

Issue (5): The plaintiff is estopped from reiving on the exemption by virtue of cl 4 in the moneylending agreements.

[36] The defendant contends that the doctrine of estoppel comes into play to preclude the plaintiff from relying on the statutory exemption by reason of cl 4 of the moneylending agreements whereby the lender undertook to conform to the provisions and requirements of the Moneylenders Act 1951. The defendant relies on s 115 of the Evidence Act 1950 and *Boustead Trading (1985) Sdn Bhd v Arab Malaysian-Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 ('*Boustead Trading*') in putting forward this contention.

[37] It is evident that PU(B)35/2009 overrides the provisions of the moneylending agreements as it is subsidiary legislation which carries the force of law. Therefore estoppel does not come into play. In any event as pointed out earlier the provisions of the Evidence Act are inapplicable in applications involving affidavit evidence. *Boustead Trading* is inapplicable on the facts of this case. It has not been shown how the defendant has acted to its detriment so as to warrant an estoppel arising against the plaintiff in its favour. Clause 4 in itself is, to my mind, insufficient to give rise to such an estoppel.

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[38] Finally and in any event, the plaintiff has, as a matter of fact complied with the provisions of the Moneylender's Act save for the inadvertent use of the wrong Forms J instead of K. This issue does not comprise a 'triable' issue.

Issue 6: If the moneylending agreements are void and unenforceable, is the plaintiff entitled to recover the monies loaned under s 66 of the Contracts Act 1950

[39] Section 66 provides as follows:

> 66 When an agreement is discovered to be void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

[40] I have found above that the moneylending agreements are NOT void and unenforceable. Accordingly s 66 does not come into play in terms of restitution.

[41] However even if I am wrong and the moneylending agreements are in fact void and unenforceable by reason of the use of the wrong Form J instead of Form K, or for non-compliance with ss 19 and 21 of the Act, it appears to this court that s 66 is directly applicable to allow the plaintiff to obtain restitution.

[42] The defendant however maintains that s 66 is not applicable according to the Federal Court decision of *Yeep Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14; [1960] 1 LNS 169 where it was held, inter alia, in construing s 66 as follows:

> ... An agreement 'discovered to be void' does not mean that the contract is void on discovery or void because of discovery of illegality. It means what it says, in that the contract was void ab initio without the parties at the time being aware of the rue legal position. It is only later that the contract is found to be void and so they become aware of its voidness. We are of the view therefore that s 66 of the Contracts Act applies to this and the appellant is entitled to the restitution of her money by the pawnshop which received an advantage from its use ...

[43] The foregoing proposition assists the plaintiff's alternative case. Here too although the issue of the moneylending agreements being void is only being raised at this juncture, it does not detract from the fact that, if the defendant is correct in its submissions in relation to Issues 1 and 2, the moneylending agreements are effectively void ab initio. According to the defendant the two moneylending agreements are void because they are in the prescribed Form J rather than K. If this is correct, then it would follow that the agreements are in fact void ab initio, although discovered subsequently. Accordingly s 66 would be effective in allowing the plaintiff to claim compensation or restitution for purely the monies it loaned to the defendant.

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Therefore this contention also fails.

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Issue 7: Has the plaintiff charged interest in excess of the statutory rate

[44] It is not in issue that both under the Moneylending Act and the statutory exemption, the plaintiff may not levy more than 12% interest in respect of secured loans. The defendant contends on its reading of the plaintiff's statement of account as exhibited in 'MSJ6' that the plaintiff has charged 16% interest on the first day of the loan. Again it is contended that this renders the loan unenforceable or illegal.

[45] Learned counsel for the plaintiff in response to this refers to exhs MSJ1 and MSJ2, namely the two agreements, on the last page of the same which disclose that the rate of interest under each agreement was 8%pa and not 16%pa as is suggested. If RM160,000 as is contended by the defendant is interest comprising 16%, then as the tenure of the facility was for two years, this amounts to 8% per year or 16% for two years. Therefore there is no contravention of the Act or the statutory exemption. In the instant case at the outset a sum of RM60,000 was taken as 'upfront interest payment' as a consequence of which the defendant did not have to make quarterly payments of RM20,000 for the first three quarters. As explained earlier, her liability only arose in the fourth quarter and thereafter until the eighth and final instalment when the entire sum loaned together with interest became due and payable. In these circumstances there is no question of interest being levied at 16% as contended by the defendant. Interest was levied at 8% as contracted. Therefore this does not comprise a 'triable' issue.

[46] I am satisfied that the plaintiff has made out a bona fide claim for a return of monies loaned together with late payment charges and that the defendant has raised no triable issues. The defendant has in fact admitted that the monies claimed are in fact due and owing but sought in the course of her letter of 4 October 2012 to procure further time to restructure and repay the loan. In these circumstances the plaintiff is entitled to judgment as prayed for in its summary judgment application in encl 6. The plaintiff is therefore granted an OIT of encl 6, namely:

(a) a sum of RM100,617.53 as at 31 December 2012 under the first credit facility;

(b) late payment charges at the rate of 8% under the first credit facility on the sum of RM81,000 from 1 January 2013 until the date of realisation;

(c) a sum of RM1,244,963.80 as of 31 December 2012 under the second credit facility;

(d) late payment charges at the rate of 8%pa under the second credit facility on the sum of RM1,085,000 from 1 January 2013 until the date of realisation; and

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(e) costs of RM15,000 payable by the defendant to the plaintiff. A

Application allowed with costs.

Reported by Kanesh Sundrum B

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